

Honorable Ronald B. Leighton
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KRISTINE M. NEIDINGER,

NO. C10-5702 RBL

Plaintiff,

vs.

[PROPOSED] PRETRIAL ORDER

ELIZABETH WYATT EARP; RICHARD D.
MALIDORE and LOIS K. MALIDORE and
the marital community thereof; JAMES
PATRICK WILLIAMS and REBEKAH JILL
WILLIAMS and the marital community
thereof; and JULIE McARTHUR and
ALLEN McARTHUR and the marital
community thereof,

Defendants.

The Parties jointly submit this Proposed Pre-Trial Order.

I. JURISDICTION

Federal Jurisdiction: Agreed.

II. CLAIMS AND DEFENSES

Plaintiffs will pursue at trial the following claims:

1. 42 U.S.C. §1983 excessive force claim against Defendant Earp.
2. 42 U.S.C. §1983 excessive force claim against Defendant Malidore.

1 3. 42 U.S.C. §1983 excessive force claim against Defendant Williams.

2 Defendants will pursue at trial the following affirmative defenses:

3 1. Qualified Immunity.

4 2. Failure to Mitigate Damages.

5 **III. ADMITTED FACTS**

6 1. On April 9 and 10, 2008, Sgt. Malidore, Dep. Earp, and Dep. Williams each
7 were employed as correctional officers in the Pierce County Jail by Pierce County, a local
8 government entity, and were at all relevant times acting within the scope of their employment.

9 2. On the afternoon of April 9, 2008, Ms. Neidinger was arrested by the Tacoma
10 Police Department for misdemeanor malicious mischief and brought to the Pierce County Jail
11 for booking.

12 3. At booking, Ms. Neidinger refused to take out her navel ring, concealed
13 numerous piercings, and as a result failed booking.

14 4. Ms. Neidinger was placed into a single-occupancy locked cell in the booking
15 area without handcuffs.

16 5. After being placed in the cell, Ms. Neidinger repeatedly banged on the cell
17 door and repeatedly yelled and screamed at the jail staff to bring her medication.

18 6. Shortly after being placed in the cell, Sgt. Malidore told Ms. Neidinger to stop
19 banging on the cell door.

20 7. Ms. Neidinger displayed her bare buttocks to Sgt. Malidore and then continued
21 to pound on the door and demand medication. Sgt. Malidore stepped away from the door.

22 8. As Ms. Neidinger continued to pound on the door and scream for medication,
23 Sgt. Malidore approached her cell and advised her that if she did not stop banging on the door
24 25

1 she would be restrained. Sgt. Malidore instructed her to step away from the door

2 9. Sgt. Malidore, together with Dep. Earp and Dep. Williams, entered the cell.

3 10. Sgt. Malidore TASED in drive stun mode on Ms. Neidinger on at least two
4 occasions.

5 11. Some combination of Sgt. Malidore, Dep. Earp, and Dep. Williams took
6 Ms. Neidinger to the floor of the cell, restrained Ms. Neidinger's arms and legs, and attached
7 at least one of her restraints to an eye bolt in the floor of the cell.

8 12. Ms. Neidinger was left in the cell, restrained, for more than two hours.

9 13. While restrained in the cell an officer looked in on Ms. Neidinger
10 approximately every 30-40 minutes to examine her welfare and safety.

11 14. Ms. Neidinger received medical care in the jail medical clinic.

12 **CONTENTIONS**

13 **A. Plaintiff Contends:**

14 1. Neither Sgt. Malidore, Dep. Earp, nor Dep. Williams had reason to believe
15 Ms. Neidinger was a danger to herself or others based upon her behavior or otherwise after
16 she was placed in the locked, single-occupancy booking cell.

17 2. Prior to Dep. Earp. opening the door to Ms. Neidinger's cell, Sgt. Malidore
18 displayed a TASER through the window in the cell door.

19 3. Prior to Dep. Earp. opening the door to Ms. Neidinger's cell, Ms. Neidinger
20 became compliant with any and all verbal orders from Sgt. Malidore, Dep. Earp, and
21 Dep. Williams, except possibly to the extent her actions were involuntary.

22 4. Some combination of Sgt. Malidore, Dep. Earp, and Dep. Williams, in the
23 process of placing Ms. Neidinger into restraints, did use a TASER on Ms. Neidinger, slam her
24
25

1 body into the floor, sit on her, hit her, pull her hair, and choke her neck.

2 5. Sgt. Malidore, Dep. Earp., and Dep. Williams each were integral participants
3 to the assaultive restraining of Ms. Neidinger.

4 6. Ms. Neidinger was left in the cell, restrained, for more than two hours with her
5 vomit and urine.

6 7. As a result of the actions of Sgt. Malidore, Dep. Earp, and Dep. Williams,
7 Ms. Neidinger did vomit; urinate; lost consciousness or had a near death experience; had a
8 hard time breathing; suffered extraordinary physical pain; suffered numbness; suffered
9 numerous wounds and bruises; suffered emotional distress; suffered anxiety; and suffered
10 humiliation.

11 **B. Defendants Contend:**

12 1. Ms. Neidinger was arrested for committing the crime of malicious mischief,
13 domestic violence.

14 2. Ms. Neidinger suffered injuries as the result of her own combative behavior
15 with her boyfriend which was the subject matter of her arrest.

16 3. Sgt. Malidore told Ms. Neidinger to stop banging on the cell door as to not hurt
17 herself or she would be handcuffed. Sgt. Malidore made this request on at least two occasions
18 but Ms. Neidinger ignored these requests.

19 4. Ms. Neidinger refused to obey commands to back towards the wall and turn
20 around so the officers could cuff her. Sgt. Malidore instructed Ms. Neidinger to go to the
21 back of the cell, turn around, and place her hands behind her back. Sgt. Malidore displayed a
22 taser through the window in the cell door, and Ms. Neidinger saw the taser and heard the
23 commands.
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1 5. Ms. Neidinger failed to obey repeated commands from officers to cease
2 pounding on the cell door and screaming and as a result she posed a threat of harm to herself
3 and caused a disruption in the booking area.

4 6. Sgt. Malidore, Deputy Earp, and Deputy Williams entered Ms. Neidinger's cell
5 in order to protect her from self harm and to restore order in the booking area.

6 7. As Sgt. Malidore attempted to enter to restrain Ms. Neidinger, Ms. Neidinger
7 held her ground and a determination was made that the quickest and safest method to restrain
8 her was to gain control with the use of a taser and quickly restrain her.

9 8. Ms. Neidinger became more combative, slapping at the taser, and forcing
10 reapplication of the taser.

11 9. After Ms. Neidinger was placed on the ground she continued to struggle with
12 Deputies Earp and Williams as they placed wrist and ankle restraints on her.

13 10. Sergeant Malidore used no more force than was objectively reasonable to place
14 restraints on Ms. Neidinger.

15 11. Deputy Earp used no more force than was objectively reasonable to place
16 restraints on Ms. Neidinger.

17 12. Deputy Williams used no more force than was objectively reasonable to place
18 restraints on Ms. Neidinger.

19 13. Ms. Neidinger was not restrained any longer than reasonably necessary to calm
20 her down enough to continue the booking process.

21 14. Even if the officers used more force than was reasonably necessary to restrain
22 Ms. Neidinger, there is no clearly established law establishing that use of a taser in this
23 manner is excessive force and therefore all defendants are entitled to qualified immunity.
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IV. ISSUES OF LAW

1. Motions in Limine.
2. Jury Instructions.
3. *Daubert* motion regarding contagion effect.
4. Qualified Immunity.

A. Plaintiff Will Call:

Testimony will concern personal knowledge of her role in the incident which is the subject of this lawsuit, as well as damages resulting therefrom. Will testify.

Testimony as use of force expert. Will testify.

Testimony will concern personal knowledge of his role in the incident which is the subject of this lawsuit. Will testify.

Testimony will concern personal knowledge of her role in the incident which is the subject of this lawsuit. Will testify.

1 5. James P. Williams
2 Pierce County Jail

3 Testimony will concern personal knowledge of his role in the incident which is the
4 subject of this lawsuit. Will testify.

5 6. Dennis Richards
6 12264 210th Place SE
 Issaquah, WA 98027

7 Testimony will concern personal knowledge of his observations and actions in the
8 aftermath of the incident which is the subject of this lawsuit. Possible witness only.

9 **B. Defendants Will Call:**

10 1. Elizabeth Wyatt Earp
11 Pierce County Corrections Deputy
12 c/o Michelle Luna-Green
13 955 Tacoma Avenue South, Suite 301
14 Tacoma, WA 98402
15 253-798-6380
16 Will testify

17 Deputy Earp will testify that inmates in holding cells may injure themselves if they are
18 allowed to continue banging on cell doors and to the effectiveness of taser use in a
19 correctional setting. She will explain all of the circumstances leading up to the need to
20 restrain Ms. Neidinger during the booking process. She will also testify to the use of the taser
21 and restraints in this case that and that Ms. Neidinger was never choked.

22 2. Ann Michelle Van Zuyt
23 Pierce County Corrections Deputy
24 c/o Michelle Luna-Green
25 955 Tacoma Avenue South, Suite 301
 Tacoma, WA 98402
 253-798-6380
 Will testify

 Deputy Van Zuyt will testify regarding Ms. Neidinger's disruptive behavior during the
initial booking process which led to Ms. Neidinger failing booking and being placed in a

1 holding cell.

- 2 3. Sgt. Richard D. Malidore
3 Pierce County Correctional Sergeant
4 c/o Michelle Luna-Green
5 955 Tacoma Avenue South, Suite 301
6 Tacoma, WA 98402
7 253-798-6380
8 Will testify

9 Sgt. Malidore will testify that inmates in holding cells may injure themselves if they
10 are allowed to continue banging on cell doors and to the effectiveness of taser use in a
11 correctional setting. He will explain all of the circumstances leading up to the need to restrain
12 Ms. Neidinger during the booking process, including the use of the taser and handcuffs.
13 Sgt. Malidore will testify that he did not choke Ms. Neidinger or use any more force than was
14 necessary to place her in handcuffs and leg restraints, and that no force was used once she was
15 in restraints. Sgt. Malidore will also explain the classification process of inmates and
16 Ms. Neidinger's classification.

- 17 4. Kenneth Leo Fleck
18 Pierce County Correctional Physicians Assistant
19 c/o Michelle Luna-Green
20 955 Tacoma Avenue South, Suite 301
21 Tacoma, WA 98402
22 253-798-6380
23 May testify

24 P.A. Fleck will testify concerning the medical information of plaintiff while in jail
25 during this incident.

- 26 5. Ltnt. Sandra Gerrish
27 Pierce County Correctional Lieutenant
28 c/o Michelle Luna-Green
29 955 Tacoma Avenue South, Suite 301
30 Tacoma, WA 98402
31 253-798-6380
32 Will testify

1 Ltnt. Gerrish will testify about Ms. Neidinger's disruptive behavior in booking.
2 Ltnt. Gerrish will testify regarding the booking process and safety considerations in the
3 booking area. Ltnt. Gerrish will also testify that she was in the doorway when the taser was
4 used and that she observed the deputies quickly attempt to get Ms. Neidinger's arms and legs
5 under control to restrain her but that Ms. Neidinger continued to resist as they were
6 attempting to restrain her. Ltnt. Gerrish will testify that she did not observe Sgt. Malidore
7 place a choke hold on Ms. Neidinger and that she did not observe anyone use any amount of
8 force above what was reasonably necessary to restrain Ms. Neidinger. She will also testify
9 that the amount of time Ms. Neidinger was restrained in the holding cell was reasonable.
10 Ltnt. Gerrish will also testify regarding the classification process and Ms. Neidinger's
11 classification.
12

13 6. Sophie Stiles
14 Pierce County Corrections Deputy
15 c/o Michelle Luna-Green
16 955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
253-798-6380
Will testify

17 Deputy Stiles will testify regarding her interaction with Ms. Neidinger following her
18 transfer from the booking area to general population and that Ms. Neidinger was more
19 interested in calling her boyfriend than going to the medical clinic.
20

21 7. Joyce Newlun
22 Pierce County Correctional Nurse
23 c/o Michelle Luna-Green
24 955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
25 253-798-6380
May testify

Ms. Newlun will testify concerning her examination of plaintiff after use of the taser.

1 8. James Patrick Williams
2 Pierce County Corrections Deputy
3 c/o Michelle Luna-Green
4 955 Tacoma Avenue South, Suite 301
5 Tacoma, WA 98402
6 253-798-6380
7 Will testify

8 Deputy Williams will testify that inmates in holding cells may injure themselves if
9 they are allowed to continue banging on cell doors and to the effectiveness of taser use in a
10 correctional setting. Deputy Williams will testify that Ms. Neidinger was not following
11 commands from Sgt. Malidore including immediately prior to use of the taser. Deputy
12 Williams will also testify that Ms. Neidinger continued to resist as he tried to gain control of
13 her legs and that he did not see Sgt. Malidore use a choke hold on Ms. Neidinger.

14 9. Julie McArthur
15 Pierce County Corrections Deputy
16 c/o Michelle Luna-Green
17 955 Tacoma Avenue South, Suite 301
18 Tacoma, WA 98402
19 253-798-6380
20 May testify

21 Deputy McArthur will testify that her only involvement in this incident was to grab
22 leg irons and hand them to Ltnt. Gerrish. She did not witness the tasing and restraint or the
23 events leading up to the tasing.

24 10. Captain Marvin Spencer
25 Pierce County Sheriff's Department, Corrections
 c/o Michelle Luna-Green
 955 Tacoma Avenue South, Suite 301
 Tacoma, WA 98402
 253-798-6380
 Will testify

 Captain Spencer will testify to the policy and procedure in the jail regarding booking,
 use of force, and taser use. Captain Spencer will testify regarding the general operations of

1 running the jail, what safety and security considerations must be taken into account during
2 booking, and why the size and area of booking and holding cells influences the use of force
3 decisions for his deputies and sergeants.

4 11. Deputy Don Carn
5 Pierce County Corrections Deputy
6 c/o Michelle Luna-Green
7 955 Tacoma Avenue South, Suite 301
8 Tacoma, WA 98402
9 253-798-6380
10 May testify

11 Deputy Carn will testify to the policy, procedures, and training regarding use of tasers
12 in the jail setting.

13 12. Mary Scott, RN
14 Nursing Supervisor Pierce County Sheriff's Department, Corrections
15 or Juliette Pohl-y-baca Physician Assistant-Corrections
16 c/o Michelle Luna-Green
17 955 Tacoma Avenue South, Suite 301
18 Tacoma, WA 98402
19 253-798-6380
20 May testify

21 Ms. Scott or Ms. Pohl-y-baca will speak to the policy and practice in the jail regarding
22 nurse inspections following use of force and will also testify to the jail clinic's practice in
23 documenting notes in a chronological record of medical care and explain the notes in this
24 matter. She will further testify to the clinic's medical treatment of inmates from booking to
25 release and how the clinic orders and dispenses medication.

13. Dennis Richards
12264 210th Pl SE
Issaquah, WA 98027
May testify

Mr. Richards will testify regarding the physical altercation between he and Ms.
Neidinger the day of the incident which was the basis of her arrest.

14. Tom Burns
 CRT Less Lethal, Inc.
 PO Box 94579
 Seattle, WA 98124
 206-334-4934
 May testify

Mr. Burns will testify regarding use of force and taser use in this case, and that in his opinion the use of force in this case was reasonable.

15. Dr. Christian Sloane
 Department of Emergency Medicine
 UCSD Medical Center
 200 W. Arbor Drive
 San Diego, CA 92103
 619-543-6463
 Will testify

Dr. Sloane will testify regarding the medical effects of tasers and will testify that in his opinion the use of the taser in drive stun mode could not have resulted in causing a gastrointestinal medical condition in Ms. Neidinger, is unlikely to have caused any cardiac, long term central nervous system effects, and that he is unaware of any reports of “near death experiences” as a result of taser use on a human subject.

VII. EXHIBITS

PLAINTIFF’S EXHIBITS:

Ex. No.	Exhibit Description	Bates Nos.	No Objection	Authenticity Admitted but Objectionable	Authenticity and Admissibility Objectionable
1.	Photo Ms. Neidinger’s left back shoulder, with TASER burns	DSC02444	X		
2.	Photo of Ms. Neidinger’s left arm, with bruises	DSC02446	X		
3.	Photo of Ms. Neidinger’s neck, with bruises and TASER burs	DSC02447	X		

Ex. No.	Exhibit Description	Bates Nos.	No Objection	Authenticity Admitted but Objectionable	Authenticity and Admissibility Objectionable
4.	Photo of Ms. Neidinger's left front torso and arm, with bruises	DSC02449	X		
5.	Photo of Ms. Neidinger's neck, with TASER burns	DSC02450	X		
6.	Photo of Ms. Neidinger's torso and arms, with bruises and TASER burns	DSC02451	X		
7.	Photo of Ms. Neidinger's right arm, with bruises	DSC02452	X		
8.	Photo of Ms. Neidinger's legs, with bruises	DSC02454	X		
9.	Photo of Ms. Neidinger's right leg, with bruises	DSC02455	X		
10.	Photo of Ms. Neidinger's right left, with bruises	DSC02456	X		
11.	Transcript of deposition upon oral examination of Richard D. Malidore			X	
12.	Transcript of deposition upon oral examination of Elizabeth Earp			X	
13	Transcript of deposition upon oral examination of Ernest Burwell			X	

DEFENDANTS' EXHIBITS:

Ex. No.	Exhibit Description	Bates Nos.	No Objection	Authenticity Admitted but Objectionable	Authenticity and Admissibility Objectionable
A-1.	PC Medical Records	002	X		
A-2	PC Medical Records	003	X		
A-3	PC Medical Records	004	X		
A-4	PC Medical Records	005	X		

Ex. No.	Exhibit Description	Bates Nos.	No Objection	Authenticity Admitted but Objectionable	Authenticity and Admissibility Objectionable
A-5	PC Booking Records – Swing Shift New Jail	0050	X		
A-6	PC Booking Records – Booking ID Sheet	0051	X		
A-7	PC Booking Records – Charges and Sentence	0052	X		
A-8	PC Booking Records – Special Identification Processing Form	0053	X		
A-9	PC Booking Records – Booking Checklist	0054	X		
A-10	PC Booking Records – Inmate Property Inventory	0055	X		
A-11	PC Booking Records – Initial Housing Assessment	0056	X		
A-12	PC Booking Records- Bail Receipt Information	0058	X		
A-13	PC Booking Records- Inmate Property Inventory	0059	X		
A-14	PC Booking Records- Release from Custody	0060	X		
A-15	Malidore Incident Report	1958	X		
A-16	Earp Incident Report	1959	X		
A-17	Photo of Booking Area	1960	X		
A-18	Photo of Booking Area	1961	X		
A-19	Photo of Booking Area	1962	X		
A-20	Photo of Booking Area	1963	X		
A-21	Photo BK-D with toilet	1964	X		
A-22	Photo BK-D facing out door	1965	X		
A-23	Photo BK-D bench	1966	X		
A-24	Photo BK-D left corner/toilet	1967	X		
A-25	Photo BK-D bench	1968	X		
A-26	Photo BK-D door open, right view	1969	X		
A-27	Photo BK-D outer door left view	1970	X		

Ex. No.	Exhibit Description	Bates Nos.	No Objection	Authenticity Admitted but Objectionable	Authenticity and Admissibility Objectionable
A-28	Photo BK-D door closed	1971	X		
A-29	Photo BK-D door closed, wider angle	1972	X		
A-30	Inmate Watch Sheet Employees	1960-A	X		
A-31	CRT Powerpoint Slides	2057-2066	X		
A-32	Photograph of Plaintiff	2448	X		
A-33	Ms. Neidinger's Booking Photograph - Color		X		
A-34	Diagram BK-D		X		
A-35	Diagram Booking Area		X		
A-36	Historical Inmate Behavioral Log Entry Report Person ID 751909		X		
A-37	Neidinger Medical Records – St. Clare – 7- 21-08	179-194 200-206 220		X	
A-38	Neidinger Medical Records – St. Clare – 8- 24-09	627-650		X	
A-39	Neidinger Medical Records – - Franciscan Behavioral Health - 4- 15-09 -	777-778		X	
A-40	Neidinger Medical Records – St. Clare Hospital - 9-30-09	519-551 586		X	
A-41	Neidinger Medical Records – 10-13-09 -	504-518		X	
A-42	Deposition of Kristine Neidinger, Vol. I & II			X	
A-43	Preservation Deposition of Tom Burns			X	
A-44	Defendants' Second Set of Interrogatories and Answers Thereto		X		
A-45	Defendants' Rule 34 Request for Inspection - Photograph of Pentagram Necklace		X		

1 DATED this 7th day of September, 2012.

2 MARK LINDQUIST
3 Prosecuting Attorney

4 s/ MICHELLE LUNA-GREEN
5 MICHELLE LUNA-GREEN
6 State Bar Number 27088
7 Pierce County Prosecutor / Civil
8 955 Tacoma Avenue South, Suite 301
9 Tacoma, WA 98402-2160
10 Ph: 253-798-6380 / Fax: 253-798-6713
11 E-mail: mluna@co.pierce.wa.us

12 FT LAW, P.S.

13 s/ CHRISTOPHER TAYLOR
14 CHRISTOPHER TAYLOR
15 State Bar Number 38413
16 404 Legion Way SE, Suite 100
17 Olympia, WA 98501
18 Ph: 360-352-8004 / Fax: 360-570-1006
19 Email: taylor@ftlawps.com
20 Attorney for Plaintiff

21 **CERTIFICATE OF SERVICE**

22 On September 7, 2012, I hereby certify that I electronically filed the foregoing
23 DEFENDANTS' PROPOSED VOIR DIRE with the Clerk of the Court using the CM/ECF
24 system which will send notification of such filing to the following:

- 25
- **Christopher Taylor:** taylor@ftlawps.com

26 s/ JAMIKA T. HILLIARD
27 JAMIKA T. HILLIARD
28 Legal Assistant
29 Pierce County Prosecutor's Office
30 Civil Division, Suite 301
31 955 Tacoma Avenue South
32 Tacoma, WA 98402-2160
33 Ph: 253-798-6872 / Fax: 253-798-6713